16 C.F.R. Part 310: Telemarketing Sales Rule
Notice of Proposed Rulemaking to Amend the Rule
To Address the Sale of Debt Relief Services,
and Announcement of Public Forum
Summary of Communications Pursuant to Commission Rule 1.26(b)(5)

Donald S. Clark
Secretary
June 23, 2010

MEMORANDUM

To: Don Clark

From: Evan R. Zullow, Attorney, Division of Financial Practices

Re: Telemarketing Sales Rule – Debt Relief Amendments, Comments to be Placed on the Public Record

Date: June 23, 2010

On Thursday, June 3, 2010, representatives from two debt settlement trade associations – The Association of Settlement Companies (TASC) and the United States Organization for Bankruptcy Alternatives (USOBA) (collectively, "the trade associations") – met with FTC Commissioner Kovacic, his attorney advisors, and FTC staff members to discuss the proposed debt relief amendments to the Telemarketing Sales Rule ("TSR").[1]

The trade associations stated that they had three overarching points to convey: (1) that debt settlement is a legitimate industry, with good actors, that provides substantial benefits to consumers; (2) that TASC and USOBA have been actively engaging FTC staff and participating in the rulemaking process; and (3) that they are concerned that the Commission may include an advance fee ban in the final amended TSR, which they believe would hurt both debt settlement companies and consumers.

The trade associations stated that they believe debt settlement companies provide benefits to consumers, and that these benefits could be lost if the Commission were to adopt an advance fee ban. They noted that TASC and USOBA members, collectively, have over 500,000 consumers.[2] Additionally, they argued that the information they submitted to the Commission in connection with the rulemaking, and consumer testimonials, demonstrate the benefits that debt

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[1] In attendance from TASC were: Andrew Strenio, Sidley Austin LLP; Andrew Housser, CEO of Freedom Debt Relief and TASC Board Member; Robert Linderman, General Counsel of Freedom Debt Relief and TASC Vice President; and Wesley Young, Legislative Director of TASC. In attendance from USOBA were: Jonathan Massey, Massey & Gail LLP; John Ansbach, Legislative Director of USOBA; and Samuel Brunelli, Team Builders International.

In attendance from the FTC were: Commissioner Kovacic, Marc Winerman, Elizabeth Schneirov, David Shonka, Lawrence Wagman, Keith Anderson, Alice Hrdy, and Evan Zullow.

[2] The trade associations also stated that TASC and USOBA each have roughly 200 member companies.

settlement provides to consumers.

The trade associations emphasized that debt settlement is a labor-intensive process that requires them to hire skilled workers who can engage in negotiations with creditors and provide good customer service to consumers. They stated that they must provide significant services to their consumers long before any settlements are reached. According to them, when a consumer first contacts a debt settlement provider, the provider typically engages in a one-to-two week consultation during which it explains the mechanics of debt settlement to the consumer and analyzes whether that consumer is suitable for debt settlement. Generally, they noted, debt settlement is designed for consumers who cannot afford to make the monthly payments associated with credit counseling – which are typically 2% to 3% of the debt balance – but who also want to avoid bankruptcy, which they said is appropriate for consumers who cannot make monthly payments of 1.5% to 2% of their debt balance. The trade associations stated that they frequently refer consumers to credit counseling or bankruptcy if they believe that these avenues are more appropriate.[3]

The trade associations stated that once a consumer enrolls in debt settlement, the provider will begin the process of negotiating with creditors. Negotiations can last anywhere from a few days to several months. In the meantime, providers must field a large volume of day-to-day customer service calls and correspondence from enrolled consumers. The trade associations stated that their consumers usually have not been enrolled in debt settlement before, so the provider must dedicate significant time and effort to offer them advice on issues like debt collection calls and saving money for settlements.

With regard to the proposed Rule, the trade associations stated that they support the majority of it, particularly the disclosure and misrepresentation provisions. They believe that most of the consumer protection problems associated with debt settlement stem from deceptive advertisements disseminated by a few bad actors. For example, they stated that they are very concerned about advertisements in which the advertiser falsely claims an affiliation with the government or government "bailouts."[4] In addition, they stated that they do support fee limits, such as those adopted in a statute recently enacted in Tennessee.[5]

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[3] The trade associations also summarized the credit counseling model. In doing so, they stated that credit counseling was originally created by creditors and that credit counselors obtain "fair share" payments from creditors for accounts they enroll. The trade associations also argued that credit counseling is more automated, and requires less labor-intensive negotiation, than debt settlement.

[4] In fact, USOBA stated that it has adopted a "zero tolerance" policy on deceptive advertising and will expel any member who violates that policy.

[5] The Tennessee statute allows providers to collect a $400 enrollment fee and then additional fees – not to exceed 17% of the consumer's debt amount – over the first half of the program.

However, they believe that an advance fee ban is too aggressive a solution and that it will have several negative consequences. First, they argued, it will cause many legitimate debt settlement companies to shut down. As an example, they noted that in North Carolina, which has banned the collection of advance fees, debt settlement providers have stopped doing business. Second, the trade associations argued that an advance fee ban would create incentives for providers to cease screening consumers for suitability and to scale down their customer service. Third, they argued that an outright ban of advance fees would compel debt settlement providers to increase the overall amount of fees they charge to each consumer. Fourth, the trade associations argued that an advance fee ban would give creditors too much leverage in the negotiation process; specifically, because creditors will know that debt settlement companies cannot receive their fees until settlement, the creditors will make less generous settlements. They stated that this is evidenced by the fact that some creditors have voiced support for an advance fee ban at both the state and federal levels.

The trade associations then summarized a proposal detailed in their letter to Bureau Director David Vladeck dated April 28, 2010. The TASC and USOBA proposal recommends that the Commission consider granting safe harbor from the advance fee ban to debt settlement companies engaged in certain safeguards, such as: (1) providing prospective consumers with a choice between an advance fee or a performance-based fee; (2) screening prospective consumers to ensure that they are suitable for debt settlement; (3) providing consumers who drop out with either full or partial refunds – depending on the stage of the program at which they dropped out; or (4) demonstrating to the Commission, according to some objective measurement to be determined (e.g., a savings-to-fee ratio), that they are providing an overall benefit to consumers.

Finally, the trade associations cautioned that, if an advance fee ban were adopted, it could cause harm to debt settlement companies, consumers, and competition that would be hard to reverse. On the other hand, they argued, if the Commission were to adopt the trade associations' proposal for safe harbor, the agency could more easily amend the Rule to mitigate any negative unforseen consequences.